

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 13, 2009

Les Trobman, General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

CHIEF CLERKS OFFICE

2009 JUL 13 PM 4:05

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: SOAH Docket No. 582-09-1256; TCEQ Docket No. 2008-0642-MLM-E;
Executive Director of the Texas Commission on Environmental Quality v.,
Weirich Brothers, L.P.

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **August 3, 2009**. Any replies to exceptions or briefs must be filed in the same manner no later than **August 13, 2009**.

This matter has been designated **TCEQ Docket No. 2008-0642-MLM-E ; SOAH Docket No. 582-09-1256**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and seven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Kerrie Jo Qualtrough".

Kerrie Jo Qualtrough
Administrative Law Judge

KJQ/ds (pp)
Enclosures
cc: Mailing List

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: WEIRICH BROTHERS, L.P.

SOAH DOCKET NUMBER: 582-09-1256

REFERRING AGENCY CASE: 2008-0642-MLM-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ KERRIE QUALTROUGH**

REPRESENTATIVE / ADDRESS

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xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-09-1256
TCEQ DOCKET NO. 2008-0642-MLM-E

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,

Petitioner

V.

WEIRICH BROTHERS, L.P.,

Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

2009 JUL 13 PM 4:05

CHIEF CLERKS OFFICE

PROPOSAL FOR DECISION

I. INTRODUCTION

In this enforcement action, the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) asserts that Weirich Brothers, L.P. (the Respondent) violated the Texas Health and Safety Code and the TCEQ rules by causing an outdoor burning and allowing the improper disposal of industrial solid waste. The Administrative Law Judge (ALJ) concludes that the Respondent is responsible for the violations and should pay an administrative penalty of \$8,670, which is less than the \$10,795 that the ED recommends.

II. BACKGROUND

The Respondent operated a wet sand and gravel processing plant in Junction, Kimble County, Texas.¹ In response to a complaint, the TCEQ San Angelo regional office conducted an investigation on January 28, 2008.² The complainant had concerns regarding outdoor burning and oil staining on the property. The resulting investigation documented that outdoor burning had occurred at the site, as well as disposal of industrial solid waste. Based on these facts, the investigator concluded that violations of the state's environmental laws had occurred and this enforcement case was initiated.

¹ ED Exh. 3, pg. 1. All page references refer to the bates stamp on the exhibit in the lower right hand corner of the page. The page references do not refer to the page number of the actual document.

² ED Exh. 3, pg. 1.

III. PROCEDURAL HISTORY, JURISDICTION, & NOTICE

On September 16, 2008, the ED mailed the "Executive Director's Preliminary Report and Petition (EDPRP) to the Respondent.³ The Respondent filed its answer on October 8, 2008.⁴ On November 10, 2008, the ED requested that the case be transferred to the State Office of Administrative Hearings (SOAH).⁵ On December 1, 2008, the notice of hearing was mailed to the Respondent stating that a preliminary hearing would be held on February 5, 2009.⁶ The parties waived appearances at the preliminary hearing and agreed to conduct the hearing on the merits on May 14, 2009.⁷

On February 24, 2009, the "Respondent's Stipulations" were filed. The Respondent's attorney filed these stipulations and essentially stipulated that all the alleged violations occurred and that the recommended penalty of \$10,795 was correctly calculated.

On May 14, 2009, SOAH held the hearing on the merits. Terry Weirich appeared on behalf of the Respondent without his attorney. Mr. Weirich stated that he did not approve the filing of the stipulations. Although he did not contest that the violations had occurred, it was his position that the burning was an accident, that the waste was not his, and that he could not pay the penalty.

IV. ALLEGED VIOLATIONS, RECOMMENDED PENALTIES, AND CORRECTIVE ACTION

The ED alleged that the Respondent violated section 335.4, title 30 of the Texas Administrative Code (30 TAC) regarding the improper handling of industrial solid waste. The ED also alleged that the Respondent violated section 382.085(b) of the Texas Health and Safety Code and 30 TAC § 111.201 by allowing an unauthorized outdoor burning to occur.

³ ED Exh. A.

⁴ ED Exh. B.

⁵ ED Exh. C.

⁶ ED Exh. D.

⁷ Feb. 2, 2009 "Joint Motion to Waive Appearance at Preliminary Hearing and Submission of Agreed Hearing Schedule."

The ED sought an administrative penalty of \$10,795 and requested that the Respondent perform corrective action.⁸ The ED would require the Respondent to cease handling industrial waste in an improper manner, cease the outdoor burning, implement procedures for proper disposal of waste, sample and remove contaminated soil, and remove and properly dispose of all waste at the plant.⁹

1. Violation No. 1: 30 TAC § 335.4

a. Legal Requirements

The ED alleged that the Respondent violated 30 TAC § 335.4. This section provides that “no person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste or municipal hazardous waste in such a manner so as to cause . . . the endangerment of the public health and welfare.”¹⁰ “Industrial solid waste” is defined as “[s]olid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operation”¹¹

b. The ED’s Position

The TCEQ’s investigator, Luke Jones, testified on behalf of the ED. On January 28, 2008, two TCEQ investigators conducted an investigation at the Respondent’s site. This investigation was in response to a complaint of outdoor burning and “a lot of oil staining on the ground.”¹² The investigators were also following up on another notice of violation (NOV) issued to the Respondent on July 16, 2007. The July 16, 2007 NOV addressed the Respondent’s alleged “[f]ailure to comply with the general prohibitions regarding municipal and solid wastes.”¹³

⁸ ED Exh. A, pg. 6.

⁹ ED Exh. A, pg. 6-7.

¹⁰ 30 TAC § 335.4(3).

¹¹ *Id.* § 335.1(75).

¹² ED Exh. 3, pg 1.

¹³ ED Exh. 3, pg. 2.

In responding to the complaint on January 28, 2008, the investigators met with Mr. Weirich who informed them that his wet gravel and sand plant had been shut down on November 16, 2007. The investigators saw that the plant was being disassembled and removed from the site.

The investigators viewed the areas that were the subject of the July 16, 2007 NOV. On the west side of the site, wastes still remained in the pit, including treated wood, ash, metal, furniture, cardboard, plastic crates, and metal fencing. The tires that were previously buried in the pit were now stored on the surface.¹⁴

The investigators took soil samples of stained areas at the site. The samples were taken at various locations where there was evidence of staining on the ground.¹⁵ The samples showed elevated levels of Total Petroleum Hydrocarbons (TPH) ranging from 70.2 mg/kg to 63,000 mg/kg.¹⁶

c. The Respondent's Position

Mr. Weirich testified on behalf of the Respondent. He and two other partners are owners of Weirich Brothers, L.P. Mr. Weirich stated that the limited partnership leased the land where the wet sand and gravel plant was located. He stated that much of the waste in "the landfill" came from the owner of the property, Mr. Davis.

Regarding the stipulations filed on his behalf, Mr. Weirich stated that he did not want to stipulate to liability until he knew the amount of the administrative penalty. Therefore, his attorney apparently acted without Mr. Weirich's consent. Mr. Weirich is no longer represented by his attorney in this proceeding.

¹⁴ ED Exh. 3, pg. 2, 112-114; ED Exh. 13, pg. 5-12.

¹⁵ ED Exh. 3, pg. 2, 115, 117, 118, 120, 121; ED Exh. 13, pg. 15, 19, 20, 22, 29-33.

¹⁶ ED Exh. 3, pg. 3.

d. The ALJ's Analysis

The ALJ agrees with the ED that the Respondent violated 30 TAC § 335.4. The waste generated from the Respondent's wet sand and gravel operations meets the definition of industrial solid waste. While some waste may be attributable to the landowner, some of the industrial solid waste on-site was clearly generated by the Respondent's operations. The Respondent disposed of tires and scrap metal on the property and attempted to remove them.¹⁷

Furthermore, the evidence indicates that the Respondent allowed the disposal of fuel or motor oil used in his operations. The evidence indicates that the Respondent either dumped or allowed his equipment to leak oil or fuel in sufficient quantities to contaminate the soils on the property.¹⁸ For example, heavy staining and elevated TPH levels were found under the Respondent's loader¹⁹ and tank trailer.²⁰ In all the soil samples taken at the site, the levels of TPH ranged from 70.2 mg/kg to 63,000 mg/kg.²¹ The ED's evidence demonstrated that the Respondent violated section 335.4 by allowing the disposal of industrial solid waste.

The stipulation submitted by the Respondent's attorney provides the necessary evidence to satisfy the requirement of section 335.4(3) that the disposal of industrial solid waste caused an endangerment to the public health and welfare.²² As Mr. Weirich testified, he did not approve of the filing of the stipulations by the attorney. Nevertheless, since Mr. Weirich did not appear to contest that the violations actually occurred, the hearing on the merits went forward on the understanding that the contested issues in the proceeding were the amount of the administrative penalty and the Respondent's inability to pay. Therefore, based on the ED's evidence and the stipulations, the ED has shown that the Respondent violated section 335.4(3) by allowing the disposal of industrial solid waste that caused the endangerment of the public health and welfare.

¹⁷ED Exh. 3, pg. 108 & 109.

¹⁸ED Exh. 13, pg. 116-121. Exhibit 13 contains the full size photographs of the pictures of the investigation found in ED Exh. 3, pg. 111-121.

¹⁹ED Exh. 3, pg. 40 & 118 (Sample ID 20531-04, TPH 36,600 mg/kg).

²⁰ED Exh. 3, pg. 53 & 121 (Sample ID 20531-06, TPH 63,000 mg/kg).

²¹ED Exh. 3, pg. 3.

²²ED Exh. 1, pg. 3.

2. Violation No. 2

a. Legal Requirements

The ED alleged that the Respondent violated section 382.085(b) of the Texas Health and Safety Code and 30 TAC § 111.201. These provisions provide:

TEX. HEALTH AND SAFETY CODE ANN. § 382.085(b): A person may not cause, suffer, allow, or permit the emission of any air contaminant or the performance of any activity in violation of this chapter or of any commission rule or order.

30 TAC § 111.201: No person may cause, suffer, allow, or permit any outdoor burning within the State of Texas, except as provided by this subchapter or by orders or permits of the commission. . . .

b. The ED's Position

The ED received a complaint on January 2, 2008 by telephone that indicated that the Respondent was burning copper wire, tires, and other wastes.²³ During the January 28, 2008 investigation, the ED documented that various wastes located on the east side of the property had been burned²⁴ and the ED photographed these areas.²⁵

c. The Respondent's Position

Mr. Weirich did not dispute that the outdoor burning occurred. However, Mr. Weirich testified that the outdoor burning occurred by accident when he was attempting to clean up scrap iron in response to an earlier request by the TCEQ investigator. In his cross-examination of the TCEQ investigator, Mr. Weirich elicited testimony that at the time of the January 28, 2008 investigation, Mr. Weirich told the investigator that the outdoor burning occurred by accident. Mr. Weirich told the investigator at the time that while cutting up the scrap iron prior to removal, some flammable material ignited that was under the scrap metal. Mr. Weirich did not know that

²³ ED Exh. 3, pg. 2.

²⁴ ED Exh. 3, pg. 2.

²⁵ ED Exh. 13, pg. 5-12.

the flammable material was present. It is his position that he should not be found to have violated a rule since an accident can just happen.

d. ALJ's Analysis

The photographs in evidence are consistent with Mr. Weirich's testimony that the outdoor burning occurred by accident while he was trying to cut up the scrap metal. Wire appears scorched,²⁶ a water hose is partially burned,²⁷ and electric motors are singed.²⁸ The pictures do not show that waste was intentionally and thoroughly burned in lieu of proper disposal.

However, whether the outdoor burning occurred by accident or was intentional is not material to the question of whether Mr. Weirich violated the referenced sections in the Texas Health and Safety Code and the TCEQ's rules. The law states that "[n]o person may cause, suffer, allow, or permit" the emission of air contaminants²⁹ and outdoor burning.³⁰ The wording in these sections is very broad and does not require knowledge or intent.³¹ Therefore, the ED has demonstrated that the Respondent violated section 382.085(b) of the Texas Health and Safety Code and 30 TAC § 111.201 even if the outdoor burning occurred by accident.

²⁶ ED Exh. 13, pg. 7.

²⁷ ED Exh. 13, pg. 8.

²⁸ ED Exh. 13, pg. 10.

²⁹ TEX. HEALTH & SAFETY CODE ANN. § 382.085(b).

³⁰ 30 TAC § 111.201.

³¹ See, generally, *American Plant Food Corp. v. State*, 587 S.W.2d 679, 685 (Tex. Crim. App. 1979) (in interpreting water pollution statute in criminal matter, statute did not require knowledge); *Exxon Co. USA v. State*, 646 S.W.2d 536, 538 (Tex. App.—1st Dist. 1982, writ ref'd) (in interpreting air pollution statute in a criminal matter, statutory language of "cause or permit" imposed a strict liability standard, although TEX. WATER CODE ANN. § 7.177 now requires the state to prove intent in seeking a criminal conviction); *City of Galveston v. State*, 518 S.W.2d 413, 416 (Tex. Civ. App.—14 Dist. 1975, no writ) (in interpreting water pollution statute in civil matter, statute did not require intent); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 914 P.2d 750, 754 (Wash. Ct. App. 1996) (statutory language of "cause or allow" does not require intent to prove a violation); *Department of Health v. Concrete Specialties, Inc.*, 271 A.2d 595, 597 (N.J. Super. Ct. App. Div. 1970) (statutory language of "cause, suffer, allow, or permit" does not require intent).

3. Administrative Penalty

a. Legal Requirements

In determining the amount of an administrative penalty, section 7.053 of the Texas Water Code requires the Commission to consider several factors, including:

- (1) the nature, circumstances, extent, duration, and gravity of the prohibited act, with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health or safety of the public;
- (2) the impact of the violation on:
 - (A) air quality in the region;
 - (B) a receiving stream or underground water reservoir;
 - (C) instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or
 - (D) affected persons;
- (3) with respect to the alleged violator:
 - (A) the history and extent of previous violations;
 - (B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
 - (C) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
 - (D) economic benefit gained through the violation; and
 - (E) the amount necessary to deter future violations; and
- (4) any other matters that justice may require.³²

In September 2002, the TCEQ adopted the "Penalty Policy of the Texas Commission on Environmental Quality" (Penalty Policy) to implement these factors and other statutes into practice at the agency.³³

³² TEX. WATER CODE ANN. § 7.053.

³³ ED Exh. 4.

b. The ED's Position

Clinton Sims, a TCEQ Enforcement Coordinator, testified regarding the Penalty Computation Worksheet (PCW). He determined that an appropriate penalty for the alleged violations is \$10,795 based on the Penalty Policy.³⁴ Mr. Sims made the following determinations for each violation:

	Release/ Harm	No. of Violation Events	Enhancement	Final Penalty Total
Violation No. 1	Actual Release/ Moderate Harm	3 Monthly Events	27 %	\$ 9,525
Violation No. 2	Actual Release/ Minor Harm	1 Single event	27 %	\$ 1,270
Total				\$ 10,795

Mr. Sims determined that the penalty should be enhanced according to the 2002 Penalty Policy. He enhanced the penalty for each violation by: five percent because the Respondent had one similar NOV; two percent because the Respondent had one dissimilar NOV; and 20 percent because the Respondent had one agreed final enforcement order containing a denial of liability.³⁵ The Respondent's Compliance History indicates that the Respondent has one final enforcement order but does not state that the enforcement order contained a denial of liability.³⁶ The Compliance History also shows that the Respondent had two prior NOVs: one on December 1, 2005, for the failure to control dust emissions; and one on July 16, 2007, for the failure to control dust emissions and the failure to comply with prohibitions regarding municipal and industrial wastes.³⁷

³⁴ ED Exh. A, pg. 12-17. The PCW was admitted into the evidentiary record for all purposes.

³⁵ ED Exh. A, pg. 13.

³⁶ ED Exh. 5.

³⁷ ED Exh. 5, pg. 1-2.

c. The Respondent's Position

Mr. Weirich disputes the amount of the administrative penalty. Since the number of events is based on the amount of time between the date of the investigation and the staff's screening date, the penalty was increasing based on the staff's processing time and before he could act. It was his opinion that the enforcement process and the penalty calculation formula are set against people in business. He cannot remedy the violation if he is waiting for the agency to process the alleged violations. He also stated that the more he attempted to negotiate, the more the penalty went up.

Mr. Weirich testified that the penalty increased because of the prior citation for "the landfill." The Respondent leased property for the Respondent's wet sand and gravel operations. Mr. Weirich testified that the landowner dumped his household waste in a hole on the leased property. According to Mr. Weirich, this household waste was originally "included on the citation" for Weirich Brothers, L.P., the Respondent.³⁸ He was not sure if this was deleted off the original amount of the penalty in this matter. Mr. Weirich thinks it is unfair that the landowner was not contacted by the TCEQ about cleaning up his household trash disposed of on the property. While the Respondent was cleaning up the property, Mr. Weirich thinks the landowner should have been required to clean up his household waste as well.

d. The ALJ's Analysis

Pursuant to the 2002 Penalty Policy, the ED has properly calculated the amount of the base penalty. However, it appears that the base penalties were improperly enhanced. According to the PCW, the penalties were enhanced by five percent for written NOV's with similar violations.³⁹ The Respondent's Compliance History shows that he received an NOV on July 16, 2007, for dust emissions and for the "[f]ailure to comply with the general prohibitions regarding municipal and industrial waste."⁴⁰ Mr. Weirich testified that the landowner dug a hole on the

³⁸ The ALJ assumes that by "the citation," Mr. Weirich was referring to the July 16, 2007 NOV for the alleged failure to comply with prohibitions regarding municipal and industrial wastes.

³⁹ ED Exh. A, pg. 13.

⁴⁰ ED Exh. 5, pg. 2.

property and dumped his household trash. Since this NOV was in part for violating a prohibition regarding municipal waste, it appears as if the Respondent's penalty was to some extent enhanced for municipal solid waste improperly attributed to him. Therefore, the ALJ does not recommend enhancing the base penalty by five percent for having a similar NOV.

In addition, the base penalty was enhanced by 20 percent for having an "agreed final enforcement order containing a denial of liability" ⁴¹ While the Respondent's Compliance History shows that there is a prior administrative order effective December 30, 2005, the Compliance History does not indicate whether the order was an agreed order containing a denial of liability. ⁴² The Compliance History does not provide details in order to determine the appropriate enhancement as set out in the 2002 Penalty Policy. ⁴³ Therefore, the ALJ recommends that the Commission not enhance the base penalty by 20 percent.

Furthermore, the Commission may want to consider exercising its discretion to further reduce the penalty. The Respondent is no longer in business and has not operated since November 2007. Mr. Weirich has not received a salary from the Respondent since January 2007. Given the recent economic downturn, Mr. Weirich has seen his salary with an equipment company reduced by 15 percent ⁴⁴ and he expects to be the first employee laid off if that becomes necessary. Mr. Weirich also has a significant amount of credit card debt. In his testimony, he estimated he owed \$30,000 on his credit cards, while the ED's financial review determined that he owed \$23,400 as of March 1, 2009. ⁴⁵ In light of the seriousness of the economic downturn and the impact on Mr. Weirich, justice may require a lower penalty. Since Mr. Weirich is no longer in the sand and gravel business, a higher penalty amount will not deter future violations. Also, Mr. Weirich testified that the outdoor burning was caused by an accident while he was attempting to remove the scrap metal in response to TCEQ's concerns. He also attempted to bioremediate the contaminated soils. The ALJ suggests that the Commissioners may want to exercise their discretion to reduce the recommended penalty.

⁴¹ ED Exh. A, pg. 13.

⁴² ED Exh. 5, pg. 1.

⁴³ ED Exh. 4, pg. 15.

⁴⁴ ED Exh. 7, pg. 4.

⁴⁵ ED Exh. 7, pg. 4.

In sum, the Respondent has a December 1, 2005 NOV regarding dust emissions.⁴⁶ Under the 2002 Penalty Policy, an enhancement of two percent is appropriate. Therefore, the ALJ makes the following recommendations regarding the amount of the administrative penalty, although the Commission may want to consider reducing the penalty further in light of the facts of this case.

	Base Penalty	Enhancement	Total
Violation No. 1.	\$ 7,500	2 %	\$ 7,650
Violation No. 2	\$ 1,000	2 %	\$ 1,020
Total			\$ 8,670

4. Inability to Pay

a. Legal Requirements

The TCEQ has adopted rules that govern the analysis of whether a respondent is unable to pay a recommended administrative penalty. Section 70.8 states:

- (a) If any respondent, in response to a contested enforcement case, asserts an inability to pay the penalty recommended in that pleading, or challenges the executive director's recommendation regarding the amount of penalty that is necessary to deter future violations, that party shall have the burden of establishing that a lesser penalty is justified under that party's financial circumstances.
- (b) A party asserting a claim under this section must produce all financial records that would be potentially relevant to that issue within 30 days of raising that claim, but no later than 30 days before the specified date for hearing without leave from the judge. The executive director is not required to make a discovery request for such financial records. The failure of the party raising such a claim to provide all potentially relevant financial records within the time discussed in this subsection shall constitute a waiver of the claim.⁴⁷

⁴⁶ ED Exh. 5, pg. 1.

⁴⁷ 30 TAC § 70.8.

b. The ED's Position

Paige Seidenberger, the ED's Financial Analyst, testified on the Respondent's ability to pay the recommended penalty. On February 24, 2009, the ED requested a number of documents from the Respondent to determine whether he was unable to pay the recommended administrative penalty.⁴⁸ This letter was submitted to the Respondent's attorney.

Ms. Seidenberger reviewed the information subsequently submitted by the Respondent's attorney. In February 2009, the Respondent cashed in a "key man insurance policy" and had \$12,548 in its checking account as of February 27, 2009.⁴⁹ Ms. Seidenberger also determined that the Respondent's only remaining liabilities were loans payable to the partners. According to Ms. Seidenberger, it is the policy of the agency that distributions to partners are subordinate to the payment of penalties.⁵⁰ Therefore, after reviewing the Respondent's financial documentation, Ms. Seidenberger concluded that the Respondent has the ability to pay the full amount of the ED's recommended penalty.

Ms. Seidenberger also requested financial information for Weirich Concrete Corporation and for Terry Weirich personally. Terry Weirich is the general partner of Weirich Brothers, L.P.⁵¹ and personally liable for the liabilities of the partnership.⁵² According to Ms. Seidenberger's testimony, he is also the owner of Weirich Concrete Corporation. Therefore, to determine the complete financial picture, Ms. Seidenberger needed the financial information regarding Weirich Concrete Corporation and Terry Weirich, personally. However, tax returns for the concrete company and for Mr. Weirich were not provided by his attorney. Therefore, Ms. Seidenberger was unable to determine whether Mr. Weirich was personally able to pay the recommended administrative penalty.

⁴⁸ ED Exh. 6.

⁴⁹ ED Exh. 7, pg. 2.

⁵⁰ ED Exh. 7, pg. 1.

⁵¹ ED Exh. 7, pg. 3.

⁵² TEX. BUS. ORG. CODE ANN. § 153.152(b).

c. The Respondent's Position

Mr. Weirich testified that as the case dragged on, he could no longer afford an attorney. Also, he was very upset with his attorney for admitting liability in this case without first reaching agreement on the amount of the penalty.

According to Mr. Weirich, the limited partnership known as Weirich Brothers, L.P. was shut down in November of 2007 and Mr. Weirich sold off most of the assets. He stated that the sale of property in Johnson City paid off the Respondent's bank notes. Mr. Weirich attempted to clear out the Respondent's accounts payable through the sale of the Respondent's equipment. However, that sale was not entirely successful and some of the equipment had to be cut up for scrap iron. The sale of the scrap iron essentially covered the labor costs to cut up the old equipment.

There are two pieces of equipment that have not sold in spite of Mr. Weirich's efforts. One is an inoperative Bobcat and the other is a tank trailer. In addition, the Respondent has a couple of water rights.

According to Mr. Weirich, the Respondent satisfied most of its debts except for a judgment for \$10,000 from a fuel distributor. The Respondent also has a debt for \$9,000 to a parts supplier in San Antonio. In addition, the Respondent owed \$1,300 to a mining health and safety entity, but this was forgiven in light of the dissolution of the limited partnership.

Mr. Weirich has not received a salary from the Respondent since January 2007. Mr. Weirich told the TCEQ that he was in the process of closing the facilities and cleaning things up. Weirich Concrete Corporation was dissolved in September 2008.

Since Mr. Weirich has not received a salary from the limited partnership, he has incurred approximately \$30,000 in credit card debt for living expenses. Mr. Weirich is also responsible for \$60,000 in student loans, presumably for his children. Mr. Weirich is now working for an equipment company as a salesman in Fredericksburg, Texas. He was making approximately

\$40,000 per year, but that was reduced by 15 percent due to the economic downturn. Mr. Weirich stated that his employer has indicated that there could be layoffs. Mr. Weirich assumes he will be the first laid off since he was the last person hired.

Personally, Mr. Weirich inherited some property that he owns with two other siblings. Unfortunately, the siblings are not in agreement on how to dispose of the property. The property was on the market for a short time but there were few inquiries. It is no longer on the market.

Mr. Weirich has few personal assets other than his homestead and his wife's salary and retirement accounts. Mr. Weirich stated that his wife would divorce him if "this goes too far."

Regarding the proceeds from the insurance policy, Mr. Weirich testified that he gave \$5,000 to his brother, a builder in Southern California. Mr. Weirich felt obligated to give \$5,000 to his brother when things went badly in the brother's business. Mr. Weirich also used some of the insurance proceeds to make a truck payment. He has no other personal assets with which to pay this penalty.

Mr. Weirich was told by his attorney that a minimum penalty would be \$1,200 and Mr. Weirich budgeted \$800 for the attorney fees. Mr. Weirich attempted to keep \$2,000 in the Respondent's checking account to pay those obligations. Mr. Weirich was not aware that his attorney did not provide all the necessary information to Ms. Siedenberger for her review on his inability to pay the penalty.

d. The ALJ's Analysis

Because of the insurance proceeds in the Respondent's checking account, the Respondent has the ability to pay the recommended administrative penalty. Other than a couple of water rights and some inoperable equipment, the Respondent has no other assets. Furthermore, the Respondent's liabilities have mostly been satisfied.

Mr. Weirich does not have the ability to personally pay this penalty. The bulk of Mr. Weirich's assets is in his homestead and some property owned with his siblings. He has significant credit card debt and other liabilities. The ALJ does not recommend a finding that Mr. Weirich has the personal ability to pay the full amount of the recommended administrative penalty.

5. Corrective Action

The ED recommended that the Commission order the Respondent to perform corrective action.⁵³ However, as of October 2008, the Respondent no longer has access to the property. For this reason, the ALJ does not recommend including any of the ED's recommended corrective action requirements in any order issued by the Commission in this matter.

6. Summary

The Respondent has violated state law prohibitions regarding industrial solid waste and outdoor burning. An administrative penalty of \$8,670 is the appropriate amount for these violations as directed by the 2002 Penalty Policy, although in light of the facts of this case, the Commission may want to exercise its discretion and assess a lower penalty. Since the Respondent no longer has access to the property, the ALJ does not recommend that the Commission order the Respondent to take corrective action.

SIGNED July 8, 2009.


KERRIE JO QUALTROUGH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

⁵³ ED Exh. A, pg. 6-8.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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CHIEF CLERKS OFFICE



**An ORDER Assessing Administrative Penalties
Against Weirich Brothers, L.P.; TCEQ Docket
No. 2008-0642-MLM-E and SOAH Docket No.
582-09-1256**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Weirich Brothers, L.P. (the Respondent). A Proposal for Decision (PFD) was presented by Kerrie Jo Qualtrough, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the EDPRP on May 14, 2009, in Austin, Texas.

FINDINGS OF FACT

1. The Respondent operated a wet sand and gravel processing plant (the Plant) in Junction, Kimble County, Texas.
2. The Respondent caused the outdoor burning of tires, metals, hose, plastic lubricant containers, motors, and aerosol cans at the Plant.

3. The Respondent improperly disposed of industrial solid waste at the Plant that resulted from his wet sand and gravel processing operations. The Respondent did not properly dispose of tires and scrap metal.
4. The Respondent caused the improper disposal of industrial solid waste by allowing his equipment to contaminate the soils at the Plant with total petroleum hydrocarbons (TPH).
5. The improper disposal of industrial solid waste endangered public health and welfare.
6. On September 16, 2008, the ED mailed the EDPRP to the Respondent. The ED alleged that the Respondent violated 30 TEX. ADMIN. CODE (TAC) § 335.4 regarding the proper handling of industrial solid waste. The ED also alleged that the Respondent violated TEX. HEALTH & SAFETY CODE ANN. (Texas Health and Safety Code) § 382.085(b) and 30 TAC § 111.201 by causing an unauthorized outdoor burning. The ED sought an administrative penalty of \$10,795 for these three violations and requested that the Respondent perform corrective action.
7. The Respondent filed its answer to the EDPRP on October 8, 2008 and requested a hearing.
8. On November 10, 2008, the ED requested that the case be transferred to SOAH for a hearing.
9. On December 1, 2008, a notice of hearing was mailed to the Respondent stating that a preliminary hearing would be held on February 5, 2009.
10. The notice of hearing:
 - a. Indicated the time, date, place, and nature of the hearing;
 - b. Stated the legal authority and jurisdiction for the hearing;

- c. Indicated the statutes and rules the Executive Director alleged Respondent violated;
 - d. Referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the Executive Director;
 - e. Advised Respondent, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by representative would result in the factual allegations contained in the notice and EDPRP being deemed as true and the relief sought in the notice possibly being granted by default; and
 - f. Included a copy of the Executive Director's penalty calculation worksheet, which showed how the penalty was calculated for the alleged violations.
- 11. The parties waived appearances at the preliminary hearing and agreed to conduct the hearing on the merits on May 14, 2009.
 - 12. On May 14, 2009, the ALJ held the hearing on the merits. The ED appeared and Terry Weirich appeared on behalf of the Respondent without his attorney.
 - 13. The Commission adopted the "Penalty Policy of the Texas Commission on Environmental Quality" (Penalty Policy) setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
 - 14. The Respondent had a prior notice of violation (NOV) on December 1, 2005. That NOV was dissimilar to the violations alleged in this enforcement matter.
 - 15. For the violation of improperly disposing of industrial solid waste, the base penalty is \$2,500, multiplied by three monthly events, and enhanced by two percent for having a prior dissimilar NOV, for a total of \$7,650.
 - 16. For the outdoor burning violation, the base penalty is \$1,000, based on one event and enhanced by two percent for having a prior dissimilar NOV, for a total of \$1,020.

17. The Respondent has the ability to pay the administrative penalty from the proceeds of an insurance policy.
18. Terry Weirich does not have the personal ability to pay the administrative penalty.
19. The Respondent no longer has access to the Plant; therefore, the Respondent cannot undertake corrective action on the property.

CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. (Texas Water Code) § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Texas Water Code § 7.052(c), a penalty for the violations alleged in this case may not exceed \$10,000 per violation, per day.
3. Under Texas Water Code § 7.073, the Commission may order the violator to take corrective action.
4. As required by Texas Water Code § 7.055 and 30 TAC §§ 1.11 and 70.104, the Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.
5. As required by TEX. GOV'T CODE ANN. (Texas Government Code) §§ 2001.051 and 2001.052; Texas Water Code § 7.058; 1 TAC § 155.401, and 30 TAC §§ 1.11, 1.12, 39.425, 70.104, and 80.6(b)(3), Respondent was notified of the hearing on the alleged violations and the proposed penalties.

6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to Texas Government Code, chapter 2003.
7. Section 335.4(3) of 30 TAC provides that “no person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste or municipal hazardous waste in such a manner so as to cause . . . the endangerment of the public health and welfare.”
8. The Commission defines “industrial solid waste” as “[s]olid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operation, which may include hazardous waste as defined in this section.” 30 TAC § 335.1(75).
9. Based on the above Findings of Fact and Conclusions of Law, the Respondent violated 30 TAC § 335.4.
10. The Texas Health and Safety Code § 382.085(b) provides that “[a] person may not cause, suffer, allow, or permit the emission of any air contaminant or the performance of any activity in violation of this chapter or of any commission rule or order.”
11. Based on the above Findings of Fact and Conclusions of Law, the Respondent violated Texas Health and Safety Code § 382.085(b).
12. Section 111.201, 30 TAC provides that “[n]o person may cause, suffer, allow, or permit any outdoor burning within the State of Texas, except as provided by this subchapter or by orders or permits of the commission. . . .”
13. Based on the above Findings of Fact and Conclusions of Law, the Respondent violated 30 TAC § 111.201.

14. In determining the amount of an administrative penalty, section 7.053 of the Texas Water Code requires the Commission to consider several factors including:
- (1) the nature, circumstances, extent, duration, and gravity of the prohibited act, with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health or safety of the public;
 - (2) the impact of the violation on:
 - (A) air quality in the region;
 - (B) a receiving stream or underground water reservoir;
 - (C) instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or
 - (D) affected persons;
 - (3) with respect to the alleged violator:
 - (A) the history and extent of previous violations;
 - (B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
 - (C) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
 - (D) economic benefit gained through the violation; and
 - (E) the amount necessary to deter future violations; and
 - (4) any other matters that justice may require.
15. The TCEQ's 2002 Penalty Policy implements these statutory factors.
16. Based on the above Findings of Fact, Conclusions of Law, and the 2002 Penalty Policy, the Respondent should be assessed an administrative penalty of \$8,670.
17. Section 70.8, title 30 of the Texas Administrative Code provides:
- (a) If any respondent, in response to a contested enforcement case, asserts an inability to pay the penalty recommended in that pleading, or challenges the executive director's recommendation regarding the amount of penalty that is necessary to deter future violations, that party shall have the burden of establishing that a lesser penalty is justified under that party's financial circumstances.

- (b) A party asserting a claim under this section must produce all financial records that would be potentially relevant to that issue within 30 days of raising that claim, but no later than 30 days before the specified date for hearing without leave from the judge. The executive director is not required to make a discovery request for such financial records. The failure of the party raising such a claim to provide all potentially relevant financial records within the time discussed in this subsection shall constitute a waiver of the claim.

18. The Respondent has the ability to pay an \$8,670 administrative penalty.

III. ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Within 30 days after the effective date of this Commission Order, Weirich Brothers, L.P. shall pay an administrative penalty in the amount of \$8,670 for violations of Texas Health and Safety Code § 382.085(b) and 30 TAC §§ 111.201 & 335.4. The payment of this administrative penalty will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: Weirich Brothers, L.P, TCEQ Docket No.2008-0642-MLM-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
3. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
4. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Texas Government Code § 2001.144.
5. As required by Texas Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Buddy Garcia, Chairman
For the Commission